

Original filed
June 16, 2000

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
CUNNINGHAM FAMILY TRUST,) No. 00-30959DM
Debtor.) Chapter 11
_____)

**ORDER DISMISSING CASE AND RESERVING
JURISDICTION TO DETERMINE SANCTIONS**

For the reasons set forth below, this Court dismisses this case with prejudice, but retains jurisdiction to hear a motion for contempt and sanctions. The following shall constitute findings of fact and conclusions of law pursuant to Rule 7052, Federal Rules of Bankruptcy Procedure.

On May 15, 2000 secured creditor Bank of America (the "Bank") filed its motion for dismissal of this case with prejudice, or, in the alternative, termination of the automatic stay *in rem* against the real property located at 295 Pacific Way, Muir Beach, California (the "Property"). The United States Trustee filed its joinder in the motion to dismiss on May 24, 2000, and requested that this Court retain jurisdiction to hear a motion for contempt and sanctions. The Cunningham Family Trust (the "Trust") filed an opposition on May 25, 2000. The motion came on for hearing on May 25, 2000 at 9:30 a.m., Joan M. Grimes,

1 Esq. appeared for the Bank, David L. Cunningham, Esq. ("Cunningham")
2 appeared for the Trust, and Patricia A. Cutler, Esq. appeared for the
3 Office of the United States Trustee.

4 As an initial matter, the Court notes that the Bank's motion was
5 timely insofar as it requested relief from the automatic stay (B.L.R.
6 4001-1(c)), and that the Bank served all creditors included on the
7 Trust's creditor matrix, but that the Bank did not provide the 20-day
8 notice required by Rule 2002(a)(4). However, the Court notes that
9 neither the Trust nor the U.S. Trustee nor any other party objected to
10 the lack of 20-day notice, and the Court will use its discretion under
11 Rule 9006(c) to reduce the required time *nunc pro tunc*.

12 In support of dismissal, the Bank argues that the Trust is not a
13 "person" and is therefore ineligible to be a debtor under 11 U.S.C.
14 § 109. The Trust responds, without citation, that under common law
15 principles the trust is tantamount to a corporation, and is therefore a
16 person entitled to relief under the Bankruptcy Code.

17 The court takes judicial notice that this same issue arose in
18 connection with a prior Chapter 11 bankruptcy petition filed by the Trust
19 on October 20, 1998 (Case No. 98-34723). In response to that earlier
20 petition, this Court issued an Order to Show Cause, on October 26, 1998,
21 directing the Trust to appear on November 10, 1998 to address this issue.
22 On October 29, 1998 the U.S. Trustee filed a response which argued that
23 the Trust's lack of business purpose was shown by the terms of the
24 Trust's Memorialization of Irrevocable Trust Agreement, Cunningham Family
25 Trust, dated October 4, 1990 (the "Trust Agreement"), which had been
26 produced by Cunningham in an earlier, personal Chapter 11 case (Case No.
27 96-11164). The Trust Agreement defines the trust estate to include the
28 Property and all household equipment and furnishings located therein.

1 The U.S. Trustee quoted from the Trust Agreement as follows:

2 The spirit, direction and mandate of this Family Trust is to
3 maintain and keep those special family keepsakes in use and
4 enjoyment by all members of the family for the Duration of
5 this Trust.

6 (Trust Agreement p. 3, attached as Exhibit B to Declaration of Stephen
7 L. Johnson in Support of United States Trustee's Response to Order to
8 Show Cause, filed October 29, 1998.)

9 The Trust did not file any response to the Order to Show Cause or
10 the U.S. Trustee's response in this earlier case. However, Cunningham
11 did appear at the hearing on November 10, 1998, at which time this Court
12 ordered the Trust to file and serve on the U.S. Trustee a declaration
13 relating to its alleged business activities, and continued the Order to
14 Show Cause hearing to December 4, 1998. The Trust failed to file any
15 such declaration. Cunningham appeared at the continued hearing and
16 stated that, for financial reasons, the Trust had determined not to
17 oppose the dismissal.

18 Based on the foregoing record, this Court finds that the Trust has
19 failed adequately to respond to the Bank's allegations that it is not a
20 "person" qualified to be a debtor, and the Trust has failed to produce
21 any evidence to rebut the evidence in the record that it not engaged in
22 any business activity. Therefore, the Trust's bankruptcy case is hereby
23 dismissed pursuant to 11 U.S.C. § 1112(b), 109(a) and (d), and § 101(41).
24 See In re Hunt, 160 B.R. 131, 134-136 (9th Cir. BAP 1994).

25 The dismissal shall be with prejudice for the following reasons.
26 First, the issue is not moot. Although the Trust might conceivably be
27 eligible to file a bankruptcy petition, it has not yet carried its burden
28 of proof. If facts exist now or in the future that would justify a
filing, the Trust should first demonstrate its eligibility before

1 burdening the court, the United States Trustee and other parties with a
2 new petition.

3 Second, the Trust has evaded any judicial determination of its
4 eligibility. The Trust had the opportunity to present evidence that it
5 is engaged in business in its prior Chapter 11 case before this court.
6 It was ordered to do so by November 10, 1998, and was then given
7 additional time, until December 4, 1998. However, the Trust acquiesced
8 in dismissal without presenting any evidence it was engaged in business.
9 In the present case, the Trust failed to file a meaningful response to
10 the Bank's and the U.S. Trustee's allegations that it was not engaged in
11 business.

12 Third, the Trust has made false statements in papers filed with
13 this Court. In its opposition to the Bank's motion, the Trust falsely
14 claimed it "has not filed any petition for relief for bankruptcy
15 protection" and "this is the first request for relief by the Trust."
16 (Opp. pp. 2:2-3 and 3:6.) The Trust's statements are all the more
17 surprising because it disclosed its prior filing in the petition it filed
18 to commence this present case.

19 Fourth, the Trust did not dispute the Bank's evidence that no
20 payments have been made since September 8, 1997 on a promissory note held
21 by the Bank, in the original principal amount of \$100,000, of which
22 \$96,207.26 remains unpaid (not including interest and other charges).
23 Nor has the Trust disputed the Bank's evidence that no payments have been
24 made since August 13, 1998 on a second promissory note held by the Bank,
25 in the original principal amount of \$149,000, of which \$202,747.82
26 remains unpaid (not including interest and other charges).

27 For the foregoing reasons, dismissal with prejudice is appropriate.
28 See, e.g., In re A-K Enterprises, Inc., 111 B.R. 149 (Bankr. N.D. Ohio

1 1990); Walker v. Stanley, 231 B.R. 343 (N.D. Cal. 1999). The Trust is
2 hereby barred from filing any bankruptcy petition in any court, for a
3 period of one year from the date hereof, except as follows. At any time
4 after 10 days of the date hereof, the Trust may file a motion with this
5 division of this Court for leave to file a bankruptcy petition in an
6 appropriate division of this Court or any other bankruptcy court, on
7 shortened time if necessary, provided that the Trust attaches to such
8 motion a copy of this Order and provided further that such motion is
9 accompanied by a declaration detailing the Trust's business activities,
10 if any. Such motion shall be served on the Office of the United States
11 Trustee and on any creditors by U.S. Mail and, if the Trust requests that
12 the motion be heard on less than 5 days' notice, then service shall be
13 by messenger or overnight delivery.

14 The Bank has presented evidence that the foregoing conduct may be
15 part of a more substantial pattern of conduct by Cunningham related to
16 the Property. The Bank refers to four previous personal bankruptcy
17 petitions filed by Cunningham in Division 1 of this Court, before Judge
18 Jaroslovsky - Case No.'s 96-11164, 97-14497, 98-11943 and 99-13602. This
19 Court takes judicial notice that in the last of these cases, Judge
20 Jaroslovsky entered an order on March 22, 2000 dismissing Cunningham's
21 bankruptcy case and ordering:

22 Cunningham may not file any bankruptcy petition in any court
23 before March 10, 2001. In the event Cunningham files any
24 petition in violation of this order he may be cited for
contempt and any creditor may seek relief from the automatic
stay by ex parte application.

25 This Court also takes judicial notice that Cunningham is an
26 attorney admitted to the State Bar of California (Bar No. 34583).
27 According to the Bar's online records, Cunningham is an active mem

28 For the foregoing reasons, this Court retains jurisdiction over the

1 Trust and Cunningham for the purpose of hearing any motion the U.S.
2 Trustee or the Bank may choose to bring for contempt and sanctions. Such
3 motion may be brought in either the San Francisco Division or the Santa Rosa
4 Division.

5 SO ORDERED:

6 Dated: June __, 2000

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8 Dennis Montali
United States Bankruptcy Judge

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